

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Amendment of Parts 1, 21, 73, 74 and 101 of)	WT Docket No. 03-66
the Commission's Rules to Facilitate the)	RM-10586
Provision of Fixed and Mobile Broadband)	
Access, Educational and Other Advanced)	
Services in the 2150-2162 and 2500-2690 MHz)	
Bands)	
)	
Part 1 of the Commission's Rules - Further)	WT Docket No. 03-67
Competitive Bidding Procedures)	
)	
Amendment of Parts 21 and 74 to Enable)	MM Docket No. 97-217
Multipoint Distribution Service and the)	
Instructional Television Fixed Service)	
Amendment of Parts 21 and 74 to Engage in)	
Fixed Two-Way Transmissions)	
)	
Amendment of Parts 21 and 74)	WT Docket No. 02-68
of the Commission's Rules With Regard to)	RM-9718
Licensing in the Multipoint)	
Distribution Service and in the)	
Instructional Television Fixed Service for the)	
Gulf of Mexico)	

To: The Secretary
 The Commission

**REPLY COMMENTS OF
NY3G PARTNERSHIP**

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Summary

Nothing in any of the comments filed in this proceeding refute NY3G's basic conclusion that the public interest would be better served by taking action to ensure that NY3G has the undisputed right to use the F group channels to deploy new and competitive broadband services to the millions of consumers in New York City. Through inefficient and unnecessary operations, the grandfathered co-channel ITFS licensee in New York City, TVC, has effectively blocked the ability of NY3G, the co-channel MMDS licensee, to deploy innovative and affordable broadband services to the more than fifteen million residents in the nation's largest market. Dr. Thomas Hazlett, an economist, has estimated that the cost to consumers of this delay is up to several hundred millions of dollars annually.

TVC uses the F group channels to relay to a mere 106 fixed receive sites duplicative video programming that is originated on its B group channels in the same market. TVC does this despite having applied for and received an authorization to relocate its main B group transmitter to a location that will enable it to serve all of its receive sites without any use of the F group channels. Moreover, NY3G has offered to bear the reasonable costs of relocating TVC's B group transmitter to that location, which would preserve fully its ability to serve the 106 F group receive sites at no cost to itself.

Because of the unique and particular circumstances of the New York F group co-channel conflict, the Commission could resolve this problem either in response to NY3G's recent petition to modify TVC's license or in this rulemaking. NY3G urges the Commission to choose whichever approach would be most expeditious.

If the Commission elects to resolve the New York F group co-channel conflict through this rulemaking proceeding, it should require grandfathered ITFS licensees to operate on a

secondary, non-interference basis to co-channel MMDS licensees in markets where i) the co-channel licensees continue to have substantial overlapping service areas and ii) the grandfathered ITFS licensee has other ITFS channels capable of serving the registered receive sites of its grandfathered facilities. NY3G's proposal is economically efficient, would result in the expeditious deployment of broadband services, and is fully supported by FCC precedent. Nothing submitted by other commenters in this proceeding rebuts these conclusions.

The alternatives favored by some commenters have serious flaws. Relying exclusively on negotiations will lead only to further delay. NY3G has tried that approach for twenty years, but it has not worked because it does not address the problems of uncertain spectrum rights and hold-up incentives that TVC has to block service to millions of New York residents.

“Splitting-the-football” provides no real solution. Consumers of a two-way mobile broadband service would not likely subscribe to a service covering only half of a metro area. Moreover, because there are limits on the signal strength at the service area border between co-channel licensees, a split-the-football approach in New York City would create a service exclusion area that covers all of Manhattan and large portions of Brooklyn and Queens, denying service to over seven million consumers in the core of the nation's largest market. Under these circumstances, co-channel licensees could not viably deploy services without consolidating service areas, leading to additional hold-up incentives for TVC, endless negotiations, and tragic delay in service to millions in the nation's largest market. In any event, grandfathered ITFS licensees do not have PSAs, a fundamental criteria of the split-the-football approach.

NY3G opposes the elimination of the four-channel-to-a-market limit on ITFS licenses, but agrees with the commenters that support amending the rule to permit ITFS licensees to own up to four channels from any ITFS channel group. That aspect of the restriction was

implemented to ensure efficient operations under an interleaved band plan and, accordingly, is no longer applicable or necessary. No commenter has demonstrated, however, that four channels in total is inadequate for an ITFS licensee to provide video or two-way broadband services or that the Commission's existing waiver and leasing policies would not otherwise accommodate the rare ITFS licensee with a legitimate need for more spectrum.

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**REPLY COMMENTS
OF NY3G PARTNERSHIP**

NY3G Partnership ("NY3G") by its attorneys hereby files these Reply Comments to the Report and Order and Further Notice of Proposed Rulemaking in the above-captioned rulemaking proceeding.¹

¹ See *In the Matter of Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Report and Order and Further Notice of Proposed Rulemaking, FCC 04-135 (2004) ("FNPRM"). The Commission renamed MMDS and ITFS to BRS and EBS, respectively. In light of the important historical context, NY3G uses the original designations throughout this filing.

Background

NY3G Comments. In its Comments, NY3G explained that the co-channel conflict between NY3G and TVC, the grandfathered ITFS licensee operating on the F group channels in New York City, is unique.² NY3G described it plans to deploy innovative and affordable high-speed, two-way broadband services to the more than fifteen million residents of the New York City area and its inability to do so because of the co-channel operations of TVC.³ NY3G submitted an economic analysis, the Hazlett Study, demonstrating that with the right spectrum management policies the FCC could save consumers up to several hundred millions of dollars annually and facilitate broadband availability, a key priority of the Commission and the Administration.⁴

NY3G advocated two methods by which the Commission could resolve the unique problem. First, the Commission could act on NY3G's Petition to Modify Licenses and restrict TVC's operations to its B group channels.⁵ Second, the Commission could adopt new rules that clarify the secondary status of co-channel grandfathered ITFS licensees, subject to reasonable requirements for assistance with relocation costs.⁶ As NY3G explained, such an approach is supported by the FCC's 1983 *Reallocation Order* redesignating the E and F group channels to

² See NY3G Comments, at 5-6; *see also generally*, NY3G Partnership, Petition to Modify (January 10, 2005), attached as Exhibit 1 to the NY3G Comments.

³ See NY3G Comments, at 2-3.

⁴ See *id.* at 8-11.

⁵ See NY3G Comments, at 5-6.

⁶ See *id.* at 7-12.

MMDS,⁷ is consistent with well-established Commission precedent regarding the relocation of incumbent services, and is fair to grandfathered ITFS licensees, whose ability to provide video service to a limited number of registered receive sites would be fully preserved.⁸

NY3G also defended the retention of the Commission's spectrum cap for ITFS licenses. NY3G explained that the promotion of competition and diversity requires that the Commission maintain its rule limiting ITFS licensees to four channels. However, because of the change in the band plan, there was no longer any need for restricting ITFS licensees to operations solely in one channel group. Accordingly, that aspect of the rule could be amended.

Other Comments. Only a handful of commenters addressed the issues relevant to resolving the mutual exclusivity between co-channel licensees. The only market and channel group identified by these commenters as having a spectrum conflict was the New York City F group channels.⁹

TVC and the Catholic Television Network ("CTN") were the two primary opponents of the Commission's proposal to require that grandfathered ITFS licensees operate on a secondary basis to co-channel MMDS licensees. They asserted several legal and policy justifications why such a proposal should not be adopted, as discussed in more detail herein.¹⁰ As the primary

⁷ See *In the Matter of Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in Regard to Frequency Allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service and the Private Operational Fixed Microwave Service*, Report and Order, 94 FCC 2d 1203 (1983) ("*Reallocation Order*"); *aff'd on reconsideration*, Memorandum Opinion and Order on Reconsideration, 98 FCC 2d 129 (1984) ("*Reallocation Order on Reconsideration*").

⁸ See NY3G Comments, at 7-12.

⁹ See generally, TVC Comments; CTN Comments; see also Red New York E Partnership Comments (No spectrum conflict for E group channels in New York City).

¹⁰ See, e.g., CTN Comments, at 2-7; TVC Comments, at 2-14.

method of resolving the spectrum conflict between co-channel licensees, CTN and TVC urged the Commission to require negotiations.¹¹ TVC further suggested that negotiations be limited to a defined, but unspecified, period of time.¹² In the event that negotiations are not successful, TVC and CTN urged the Commission to determine service areas by using the “split-the-football” approach.¹³ CTN provided an engineering analysis of the F group situation in the New York City market, which assumed that each of TVC’s two F group transmitters had a 35-mile radius PSA.¹⁴ The study concluded under those assumptions that the service areas would be divided such that TVC’s service area would cover approximately 51% of the New York metro area population and NY3G’s service area would cover approximately 49% of the population.¹⁵ Both CTN and TVC argued that dividing the market in such a way would provide “rough justice” in keeping with the Commission’s goals in the *FNPRM*.¹⁶ TVC also noted briefly its support for the proposal to make grandfathered ITFS licensees primary and co-channel MMDS licensees secondary but provided no support for this position.¹⁷

¹¹ See CTN Comments, at 5; TVC Comments, at 16.

¹² See TVC Comments, at 16.

¹³ See CTN Comments, at 5; TVC Comments, at 17; *see also* WCA Comments, at 26-28.

¹⁴ See Exhibit A to CTN Comments.

¹⁵ See *id.*

¹⁶ CTN Comments, at 6; TVC Comments, at 17.

¹⁷ See TVC Comments, at 17.

A number of commenters argued that the FCC should eliminate the ITFS four-channel (one channel group) restriction.¹⁸ The vast majority of these commenters reiterated without elaboration the Commission's assertion that the rule had outlived its usefulness and was no longer needed in light of the changes in the rules.¹⁹ No commenter demonstrated generally or specifically that any ITFS licensee would need more than four channels to provide any service. Several commenters noted more specifically that eliminating the restriction is necessary, under the new rules, to enable ITFS licensees to have more than one high-power channel.²⁰

Discussion

I. THE COMMENTS CONFIRM THAT THE F GROUP SITUATION IN NEW YORK CITY IS UNIQUE

Other than the F group channels in New York City, no commenter identified any market or channel group with an existing or potential co-channel conflict. In fact, the three main commenters on the co-channel issue, CTN, NY3G, and TVC, identified and discussed specifically only the F group situation in New York City.

¹⁸ See, e.g., CTN Comments, at 18; Hispanic Information and Telecommunications Network Comments, at 9; IMWED Comments, at 13; WCA Comments, at 28-30; C&W Enterprises, Inc. Comments, at 5; Cheboygan-Otsego-Preseque Isle Educational Service District and PACE Telecommunications Consortium Comments, at 5; Clearwire Corporation Comments, at 7; Speednet LLC Comments, at 5; Wireless Direct Broadcast System Comments, at 5.

¹⁹ See C&W Enterprises, Inc. Comments, at 5; Cheboygan-Otsego-Preseque Isle Educational Service District and PACE Telecommunications Consortium Comments, at 5; Clearwire Corporation, at 7; CTN Comments, at 18; IMWED Comments, at 13-14; Speednet LLC Comments, at 5; Wireless Direct Broadcast System Comments, at 5.

²⁰ See WCA Comments, at 28-30; HITN Comments, at 9.

As NY3G proposed in a related adjudicatory proceeding, the Commission should modify TVC's interrelated ITFS licenses and restrict TVC's operations to its B group channels.²¹ TVC's use of the F group channels is inefficient and unnecessary and also violates the FCC's rule limiting ITFS licensees to four-channels (one channel group) per area of operation.²²

The uniqueness of the New York City F group co-channel conflict gives the FCC the opportunity to deal with this problem through action on NY3G's Petition to Modify Licenses or through the instant rulemaking proceeding. NY3G recognizes that the Commission may resolve the co-channel conflict in either or both proceedings and encourages the Commission to make the right decision, as promptly as possible.

II. THE COMMENTS JUSTIFY ADOPTION OF RULES THAT MAKE NY3G THE SOLE PRIMARY LICENSEE ON THE F-GROUP CHANNELS IN NEW YORK CITY

In its Comments, NY3G justified the proposal to require grandfathered ITFS licensees to operate on a secondary, non-interfering basis to co-channel MMDS licensees in markets where co-channel licensees continue to have substantial overlapping service areas and the grandfathered ITFS licensee has other ITFS channels capable of serving the registered receive sites of its grandfathered facilities. While TVC and CTN oppose this proposal, their comments do not refute the need for its adoption if the F-group channels are to be put to use efficiently in New York City.

²¹ See generally, NY3G Petition to Modify Licenses (January 10, 2005); NY3G Consolidated Reply to Oppositions (February 1, 2005).

²² See *id.*

A. NY3G's proposal is supported by the Commission's MMDS/ITFS precedent

TVC and CTN, the primary opponents to this approach, contend that co-channel MMDS licensees received only a limited right to develop facilities not served by grandfathered ITFS licensees and that the rights of grandfathered ITFS licensees are protected "in perpetuity."²³ This characterization of Commission policy, however, is simply wrong.

As NY3G explained in its Comments, in 1983 the Commission redesignated the E and F group channels from ITFS to MMDS, concluding that the public interest would be better served by permitting MMDS operators, rather than ITFS operators, to use these channels.²⁴ The Commission prohibited new ITFS applications on the E and F group channels and placed a significant limitation on modifications to grandfathered ITFS facilities, essentially freezing such operations as of 1983 and effectively permitting only video operations to a fixed number of receive sites.²⁵ In fact, the Commission envisioned that grandfathered ITFS licensees would vacate those channels, pursuant to negotiated agreements with co-channel MMDS licensees.²⁶ Thus, the Commission's orders make clear that grandfathered ITFS licensees, not MMDS licensees, were the ones given a limited right to use the spectrum.²⁷ For these same reasons,

²³ See TVC Comments, at 8-20, 16; CTN Comments, at 3.

²⁴ See NY3G Comments, at 11-12.

²⁵ See *Reallocation Order on Reconsideration*, at ¶ 12.

²⁶ See *Reallocation Order*, at ¶¶ 110, 151.

²⁷ Such a conclusion is also fully consistent with and supported by well-established Commission policy regarding the relocation of incumbent services, as demonstrated in NY3G's Comments. See NY3G Comments, at 12-15.

there is no merit to TVC's assertion that the Commission intended to grandfather ITFS licensees "in perpetuity."²⁸

TVC claims that the purpose of the *Reallocation Order* was to spur the development of competition to cable, which has not materialized, and that grant of primary spectrum rights to MMDS licensees would not be related to this purpose.²⁹ Contrary to TVC's claim, the 1983 *Reallocation Order* did not purport simply to develop competitors to cable. One of the Commission's major goals in redesignating that the E and F group channels for MMDS was to make more efficient use of fallow spectrum.³⁰ While the FCC believed in 1983 that MMDS spectrum could be used for video services in competition with cable operators, it acknowledged that "many other uses are possible," including specifically "high speed data transmission."³¹ Further, the Commission explicitly stated that it would permit "any kind of communications service consistent with the Commission's Rules"³² Accordingly, TVC's claim that grant of primary spectrum rights to co-channel MMDS licensees would not be consistent with the purpose of the *Reallocation Order* is simply wrong.

²⁸ The more reasonable and legally defensible interpretation is that this language merely reflects the Commission's intent to preserve the ability of ITFS licensees to provide instructional or educational video programming to a fixed number of receive sites. *See* NY3G Comments, at 16.

²⁹ *See* TVC Comments, at 11, 14.

³⁰ *See Reallocation Order*, at ¶ 54 (discussing nationwide underutilization of ITFS spectrum).

³¹ *Reallocation Order*, at ¶ 62.

³² *Reallocation Order*, at ¶ 101 (emphasis added).

B. NY3G's proposal promotes efficiency and is supported by sound economic principles

TVC asserts that no policy justification warrants making ITFS secondary to MMDS.³³

The Hazlett Study, however, quantifiably demonstrates that taking expeditious action can lead to consumer savings of up to several hundred millions of dollars annually, flatly refuting TVC's claim.³⁴ For these same reasons, TVC's argument that MMDS "licensees are but one among several viable sources for [broadband] development" is not a legitimate justification for impeding NY3G's entry into the market.³⁵ As the Hazlett Study shows, consumer savings continue to increase as the number of competitors grow.³⁶ Moreover, this argument is contrary to good spectrum management policy, which is a key priority of the Commission and the Administration.³⁷

The Hazlett Study also shows that awarding spectrum to MMDS licensees, rather than grandfathered ITFS licensees, is supported by sound economic principles. Specifically, "when rights are assigned directly to those parties that will deploy them, transaction costs can be

³³ See TVC Comments, at 11.

³⁴ See Hazlett Study, at 15

³⁵ See TVC Comments, at 14.

³⁶ See Hazlett Study, at 14-15.

³⁷ See *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, FCC 04-167, at ¶ 2 (2004) (adopting spectrum leasing rules to enable the "more efficient and dynamic use of spectrum to the ultimate benefit of consumers throughout the country"); *Spectrum Policy Task Force Report*, EB Docket 02-135, at 21-22 (2002) (establishing Commission goal of maximizing spectrum efficiency); President George W. Bush, *Memorandum for the Heads of Executive Departments and Agencies* (November 30, 2004), available at <http://www.whitehouse.gov/news/releases/2004/11/20041130-8.html> (directing federal agencies to adopt efficiency-maximizing policies).

reduced, speeding investment and usage.”³⁸ Here, TVC concedes that it is dependent on its lessee to deploy its limited facilities and maintain its limited operations. TVC itself will not deploy or operate the kind of facilities that need to be built to fully use the prime 24 MHz that represents the F group channels in New York City. TVC maintains that its specific use of the spectrum is efficient and that it has made substantial investments, which warrant its continued use of the F group channels.³⁹ In support of this claim, TVC alleges that it has broadcast programming and leased excess capacity on this spectrum for years.⁴⁰ However, TVC fails to acknowledge that it is already authorized and technically capable of providing service to its F group receive sites using the B group channels.⁴¹ Thus, its use of the F group channels is, in fact, completely unnecessary. Moreover, TVC provides service on the F group channels to a mere 106 receive sites, whereas NY3G proposes to offer services to more than 15 million people in the New York City area. Accordingly, the evidence overwhelming shows that TVC’s use of the F group channels is woefully inefficient and, unless the Commission takes action, is fated to remain so.

With respect to TVC’s alleged investments, NY3G has offered to bear the reasonable costs associated with relocating TVC’s main B group transmitter to the ESB and reorienting its F group receive antennas.⁴² Thus, TVC’s ability to provide instructional programming to its receive sites would be fully preserved at no cost to itself.

³⁸ Hazlett Study, at 6.

³⁹ *See* TVC Comments, at 11.

⁴⁰ *See* TVC Comments, at 2, 12.

⁴¹ *See, e.g.*, NY3G Comments, at 3.

⁴² *See, e.g.*, NY3G Comments, at 8.

TVC also alleges that grandfathered ITFS licensees and their lessees have an “expectation” of continued leasing of grandfathered ITFS spectrum and that the lease revenues are critical to the ability of grandfathered ITFS licensees to provide ITFS programming.⁴³ Such an “expectation,” however, is neither reasonable nor legally relevant. The Commission has stated unequivocally that co-channel MMDS licensees are not required to protect lessees of grandfathered spectrum.⁴⁴ In fact, the Commission specifically stated in 1995 in granting NY3G’s authorization to construct an MMDS facility that “we agree with [NY3G] that the Commission determined previously that MDS stations have no duty to protect from harmful interference any lessees of ITFS station excess capacity.”⁴⁵ Accordingly, neither TVC nor its lessee could have reasonably concluded that it has any right to continued leasing the F group spectrum. For these same reasons, TVC’s claim that its lease revenues provide “critical funding to support [its] educational services” is legally irrelevant.⁴⁶

⁴³ See TVC Comments, at 6, 16.

⁴⁴ See *Reallocation Order*, at 152 n. 44 (1983) (“[L]essees of the E or F group channels will not be protected from harmful interference caused by an MDS licensee operating on these channels.”).

⁴⁵ Letter to Grand MMDS Alliance New York F/P Partnership from Charles E. Dziedzic, Assistant Chief, Video Services Division, Reference No. 1800E6, File No. 5455-CM-P-83, at 4 n. 10 (May 6, 1997).

⁴⁶ The claim is also unsupported by any facts.

III. RELIANCE ON NEGOTIATIONS TO RESOLVE PROBLEMS OF MUTUAL EXCLUSIVITY BETWEEN CO-CHANNEL LICENSEES WOULD LIKELY LEAD ONLY TO CONTINUED DELAY IN THE DEPLOYMENT OF SERVICES

Several parties argue without specific justification that the Commission should rely on negotiations to resolve co-channel problems.⁴⁷ While NY3G remains committed to voluntary negotiations with TVC to find a mutually acceptable solution, simply requiring continued negotiations would not lead to a solution, because it ignores the economic factors that underlie the co-channel problem.⁴⁸ Without specific Commission action to address the problems associated with uncertain spectrum rights and hold-up incentives, which have frustrated resolution of the co-channel problem, exclusive reliance on negotiations would likely lead only to continued delay in the deployment of services.

If the Commission, nonetheless, were to impose a mandatory negotiation period, NY3G agrees with TVC that the Commission should define a set period of time for such negotiations to avoid indefinite delay.⁴⁹ Given the parties familiarity with the issues and the benefits of rapid deployment of broadband service, NY3G recommends a 90-day negotiation period.⁵⁰

⁴⁷ See TVC Comments, at 16; CTN Comments, at 5; WCA Comments, at 26-28.

⁴⁸ See NY3G Comments, at 8-11.

⁴⁹ See TVC Comments, at 16; *see also* Hazlett Study (“Two decades of failed negotiations have amply demonstrated that unstructured bargaining can delay consumer gains indefinitely.”).

⁵⁰ See, e.g., *Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies*, 8 FCC Rcd 6589, at ¶¶ 2, 20, 23 (1993) (shortening negotiation period to encourage the rapid investment in and deployment of unlicensed services); *Amendment of Section 2.106 of the Commission’s Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service*, 15 FCC Rcd 12315, at ¶ 44 (2000) (adopting a shortened negotiation period because parties were already familiar with relocation issues and had been involved in the relevant proceeding for several years); *Amendment of Section 2.106 of the Commission’s Rules to Allocate Spectrum at 2 GHz for use by the Mobile-Satellite Service*, 18

IV. THE COMMISSION SHOULD NOT ADOPT THE SPLIT-THE-FOOTBALL APPROACH

A. The split-the-football approach provides no real solution to the New York F group co-channel conflict

Several parties urge that the Commission adopt the split-the-football approach to resolve problems of mutual exclusivity between co-channel licensees. While TVC and CTN argue that this approach is “equitable and least violative” of licensee’s rights,⁵¹ it provides no real solution for the New York F group co-channel conflict.⁵²

Under their approach, the New York City market would effectively be divided in half, with TVC, in theory, providing service to the east and NY3G providing service to the west. From a business standpoint, such service areas are completely impractical and defeat the very purpose of a mobile service. The Commission itself has consistently recognized that awarding authorizations with functional service areas is critical to the viability of licensees and the effective deployment of communication services.⁵³ Moreover, with such a limited service area, neither NY3G nor any lessee of TVC could compete effectively against other carriers that are

FCC Rcd 23638, at ¶¶ 34-35, 63 (2003) (expediting the negotiations process because advances in digital technology had reduced anticipated obstacles to relocation).

⁵¹ CTN Comments, at 5; TVC Comments, at 17.

⁵² As explained below, the split-the-football approach is also inappropriate because grandfathered ITFS licensees do not have PSAs. *See infra* Part IV.B.

⁵³ *See Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services*, FCC 04-166, at ¶ 23 (2004) (large service areas may be required to achieve economies of scale and provide for “quicker build-out of facilities”); *Amendment of the Commission's Rules to Establish New Personal Communications Services*, 8 FCC Rcd 7700, at ¶ 73 (1993) (adopting MTA and BTA service areas, because smaller service areas “likely would result in unnecessary fragmentation of natural markets”).

able to provide mobile services to the entire metro area, hindering competition and broadband availability, key policy objectives of the Commission and this Administration.⁵⁴

Moreover, because of the 47 dBuV/m signal strength limit required at the GSA border,⁵⁵ a split-the-football approach would create a huge service exclusion zone, which would preclude service to an area extending 7.8 km on each side of the border.⁵⁶ This exclusion zone would include all of Manhattan and large portions of Brooklyn and Queens, denying new and innovative services to over seven million consumers in the core of the nation's largest market.⁵⁷

As a result, if the FCC were to adopt the split-the-football approach for the co-channel New York F group licensees, the licensees could not effectively deploy a viable consumer service without consolidating their service areas. Although this approach would clarify the uncertainty regarding a licensee's spectrum rights, it would not resolve and, in fact, would likely exacerbate the hold-up problem.

⁵⁴ See, e.g., *FNPRM*, at ¶ 5; *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 17 FCC Rcd 2844, at ¶¶ 125-132 (2002); President George W. Bush, "A New Generation of American Innovation," at pp. 11-12 (April 2004), available at http://www.whitehouse.gov/infocus/technology/economic_policy200404/innovation.pdf (last visited January 10, 2005).

⁵⁵ See 47 C.F.R. § 27.55.

⁵⁶ See Engineering Study attached as Exhibit A.

⁵⁷ See *id.* at 3-6. The impact of the exclusion zone is exacerbated by TVC's incredible presumption that both its F group relays would have PSAs for purposes of applying the split-the-football methodology. That assumption significantly worsens the area and effect of the exclusion zone. See *id.* at 5-6. There is no logical reason to expand a licensee's service area merely because that licensee has duplicative transmitters, serving as relays in the same market.

B. Grandfathered ITFS stations do not have PSAs

More fundamentally, grandfathered ITFS licensees do not have PSAs, a necessary criteria of this approach. As NY3G discussed in its Comments, in 1983 the Commission prohibited new ITFS applications on the E and F group channels and placed a significant limitation on modifications to grandfathered ITFS facilities, essentially freezing such operations and permitting only video operations to a fixed number of receive sites.⁵⁸ In fact, grandfathered ITFS licensees were prohibited from adding additional receive sites, unless they met the high standards for a waiver of the freeze.⁵⁹ For these same reasons, lessees of such spectrum could also obtain no additional rights. The rights created then have since been in effect substantively unaltered.⁶⁰

Neither CTN nor TVC, the only commenters addressing this point, rebutted this analysis. Both CTN and TVC claimed that the Commission intended to establish PSAs for “all” ITFS licensees, including grandfathered ITFS licensees, in its 1998 *Two-Way Order*.⁶¹ But, the Commission’s imprecise use of the term “all” was intended to mean only “both” ITFS licensees that leased excess capacity and those that did not.⁶² The interpretation urged by CTN and TVC requires the absurd conclusion that the Commission intended to overturn, *sub silentio*, the

⁵⁸ See *Reallocation Order on Reconsideration*, at ¶ 12.

⁵⁹ See *id.*

⁶⁰ See, e.g., 47 C.F.R. § 74.902(c) (no new ITFS applications will be accepted, except for certain channel swapping applications).

⁶¹ See CTN Comments, at 3 (citing Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, 13 FCC Rcd 19112, at ¶ 114 (1998) (“*Two-Way Order*”)); TVC Comments, at 8-10.

⁶² See NY3G Comments, at 17-18.

distribution of rights between co-channel licensees that it unequivocally established in the 1983 *Reallocation Order*.⁶³

TVC further claims that two Bureau decisions support its position that grandfathered ITFS licensees have PSAs.⁶⁴ TVC, however, grossly mischaracterizes those decisions. In fact, the Bureau expressly stated, after NY3G filed a petition for clarification,⁶⁵ that it “did not purport to establish a protected service area for TVC” and that “any further elaboration or modification of the respective rights of TVC and [NY3G] should take place in the context of the pending rulemaking proceeding.”⁶⁶ Accordingly, TVC’s position that grandfathered ITFS stations have PSAs is without merit.

V. THE COMMISSION SHOULD MAINTAIN THE ITFS SPECTRUM CAP

NY3G agrees with the numerous commenters who support the proposal to amend the four-channel rule to permit ITFS licensees to own and operate up to four channels from any ITFS

⁶³ See, e.g., *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) (“[I]f an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.”); *Telephone & Data Systems, Inc. v. FCC*, 19 F.3d 42, 49 (D.C. Cir. 1994) (The Commission may change its prior decisions “by advancing a reasoned explanation for the change, but it may not blithely cast them aside.”) (citations omitted); *In re Applications of Minnie O. Foulk and Renee Ridley Biselli*, 2 FCC Rcd 5362, at ¶ 235 (1987) (The “claim that, by the use of a single word, the Commission intended to *sub silentio* overrule its longstanding precedent and consistent interpretations by the Review Board -- as well as the very instructions on FCC Form 301 -- is contrary to common sense.”).

⁶⁴ See TVC Comments, at 8-10 (“The end result of these decisions is the confirmation that, since 1998, TVC, like all other ITFS licensees, has been entitled to a PSA.”).

⁶⁵ See Petition for Clarification or Limited Reconsideration (October 6, 2003).

⁶⁶ See *In the Matter of Trans Video Communications, Inc.*, DA 04-3028, at ¶ 6 (September 21, 2004) (“*Order on Reconsideration*”).

channel group. That aspect of the restriction was implemented to ensure efficient operations under an interleaved band plan and, accordingly, is no longer applicable or necessary.⁶⁷

NY3G, however, opposes the proposal to eliminate the aspect of the limitation restricting ITFS licensees to at most four channels. The Commission has consistently held that the four-channel limitation is necessary to promote competition and diversity.⁶⁸ No commenter has demonstrated that ITFS licensees require more than four channels in a market to provide educational or instructional services. TVC's present use of eight channels to provide the same three pre-recorded programming streams for only part of the day (8:30 am to 2:15 pm) illustrates that point.⁶⁹ In fact, under digitized operations, TVC could easily provide those same three programming streams on one 6 MHz high-powered channel, rather than the 48 MHz of spectrum it currently uses.

In any event, the existing waiver process and leasing rules, in addition to the flexibility for ITFS licensees to operate on any four channels, would be more than adequate to meet all discernible spectrum needs. Moreover, in light of the ever-increasing consolidation among wireless carriers, the Commission should be wary of taking action that could frustrate ownership

⁶⁷ See, e.g., *Amendment of Sec. 74.902 of the Rules Governing Instructional Television Fixed Stations to Assign Alternative Channels to Station Operating in the Same Area Instead of Every Sixth Channel*, 2 RR 2d 1615 (1964).

⁶⁸ See NY3G Comments, at 21 n. 70.

⁶⁹ See attached Exhibit B (providing TVC's current programming schedule), *available at* http://www.theprayerchannel.net/schools/itv_sched.html (last visited February 8, 2005).

diversity and competition.⁷⁰ For these reasons, the FCC should maintain its ITFS four-channel spectrum cap.

⁷⁰ See, e.g., Jesse Drucker, *Alltel to Buy Western Wireless in Deal Valued at \$4.3 Billion*, The Wall Street Journal, January 11, 2005, at A8; *Nextel-Sprint Merger Raises Regulatory Issues*, Communications Daily, December 15, 2004, at 3.

Conclusion

For the reasons stated above and in its Comments, NY3G respectfully requests that the Commission take actions consistent with NY3G's filings in this proceeding.

Respectfully submitted,

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